

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

NO. CR-11-6004-LRS

V.

FAUSTINO GOMEZ,

Defendant.

ORDER DENYING DEFENDANT'S  
MOTION TO RECONSIDER AND  
DEFENDANT'S MOTION TO DISMISS

BEFORE THE COURT, at the scheduled motion hearing on April 20, 2011 in Yakima, is Defendant's Motion to Reconsider Motion to Dismiss, Ct. Rec. 39, filed March 23, 2011. The Court denied Defendant's Motion to Dismiss, Ct. Rec. 28, on March 15, 2011 in its Order Denying Defendant's Motion to Dismiss and Excluding Speedy Trial Act Time. Ct. Rec. 37. Assistant United States Attorney Alexander Ekstrom appeared on behalf of the Government; Alison Guernsey appeared on behalf of Defendant Gomez.

After considering the arguments of the parties, the court indicated Defendant's Motion to Reconsider would be taken under advisement.

## A. BACKGROUND FACTS

On July 31, 2001, the Defendant, Faustino Gomez, was ordered deported.<sup>1</sup> The Defendant waived appeal of the IJ Order. *Id.* The

<sup>1</sup> Ct. Rec. 33, Attachment A (Order of the Immigration Judge, dated July 31, 2001).

Defendant was deported from Paso Del Norte.<sup>2</sup> The Defendant illegally returned to the United States. On January 17, 2006, the Defendant was served with a Notice to Appear which was written in English only, alleging that he was an alien present in the United States without having been properly admitted, and additionally alleging that he had committed a crime of moral turpitude.<sup>3</sup>

The Defendant waived his right to have a 10-day period prior to appearing before an immigration judge, and requested an immediate hearing.<sup>4</sup> On January 19, 2006, the Defendant was served with a Notice to Appear that was written in English only, alleging that he was an alien present in the United States without having been properly admitted, but without the additional allegation of a crime of moral turpitude.<sup>5</sup> The Defendant again waived his right to have a 10-day period prior to appearing before an immigration judge, and requested an immediate hearing.<sup>6</sup> That same day, January 19, 2006, rather than contest his deportability, the Defendant conceded the issue in a four-page waiver of

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<sup>2</sup>Ct. Rec. 33, Attachment B (Form I-205, Warrant of Removal/Deportation.

<sup>3</sup> (Ct. Rec. 29-1) (Exhibit A) (Form I-862, dated January 17, 2006).

<sup>4</sup> Id.

<sup>5</sup> (Ct. Rec. 29-1) (Exhibit B) (Form I-862, dated January 19, 2006).

<sup>6</sup> Id.

1 hearing.<sup>7</sup> In this form, he acknowledged, among other rights, his right  
 2 to a hearing and his right to seek relief from deportation, but indicated  
 3 that he was giving up these rights and wished to be immediately returned  
 4 to his country of citizenship, Mexico.<sup>8</sup> The form was presented in both  
 5 English and Spanish. Defendant Gomez was ordered deported, without  
 6 appearing before an IJ, based on his admissions and waiver.<sup>9</sup> The  
 7 Defendant waived appeal of the IJ Order.<sup>10</sup> Defendant was deported on the  
 8 day the order was signed.<sup>11</sup> On January 11, 2011, the Defendant was  
 9 charged in this district with being an Alien in the United States After  
 10 Deportation, under 8 U.S.C. § 1326.

11 **B. Gomez's Argument Re: Invalid Waivers**

12 Defendant Gomez requests that this Court reconsider his motion to  
 13 dismiss the indictment, and consider his new Affidavit signed March 22,  
 14 2011 ("new Affidavit"), in support of his motion for reconsideration.

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17       <sup>7</sup> (Ct. Rec. 29-1) (Exhibit C) (Respondent's Stipulated Request For  
 18 Order; Waiver Of Hearing Pursuant To 8 CFR 3.25(b), dated January 19,  
 19 2006).

20       <sup>8</sup>Id.

21       <sup>9</sup> (Ct. Rec. 29-1) (Exhibit D) (Order of the Immigration Judge, dated  
 22 January 20, 2006).

23       <sup>10</sup>Id.

24       <sup>11</sup> (Ct. Rec.

25       29-1) (Exhibit E) (Form I-205, Warrant of Removal/Deportation, executed  
 26 January 20, 2006).

1 Defendant argues that his 2006 removal from the United States via a  
2 stipulated order of removal violated his right to due process of law  
3 because he never validly waived his right to appear before an Immigration  
4 Judge ("IJ") and apply for relief from removal. Defendant asserts that  
5 he was unrepresented at the time of the removal proceedings. He also  
6 argues that the Immigration Judge was required to inquire if he desired  
7 to have counsel despite his written waiver of his right to counsel and  
8 whether his signed waiver was voluntary, knowing, and intelligent  
9 pursuant to 8 C.F.R. § 3.25(b) (now 8 C.F.R. § 1003.25).  
10

11 In Defendant's new Affidavit (Ct. Rec. 40-1, Exh. J), submitted  
12 after the Court ruled on his motion to dismiss and over the objection of  
13 the Government,<sup>12</sup> Defendant advises that although he attended school  
14 through the 6<sup>th</sup> grade in his home country of Mexico, his reading  
15 comprehension skills are below an equivalent 6<sup>th</sup> grade education level in  
16 the United States. Defendant states although he learned how to read and  
17 recognize words, he has trouble understanding what he has read. In his  
18 new Affidavit, however, Defendant states that he never read the form that  
19 the immigration officer read to him.<sup>13</sup> Defendant argues that he was  
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21 <sup>12</sup>The Government provided no authority to preclude the Court from  
22 considering the supplemental facts set forth in the new Affidavit.  
23

24 <sup>13</sup>The Notice To Respondent erroneously dated 1/17/05 rather than  
25 1/17/06 (Ct. Rec. 29-1) specifically recited that it had been read to the  
26 defendant in Spanish. The document was signed by the special agent  
handling the defendant's deportation.

1 denied the right to retain counsel and the IJ in his case never addressed  
2 his waiver of the right to counsel. Further, Defendant asserts the IJ  
3 never engaged in a colloquy, which he/she is required to do since he was  
4 unrepresented, to determine if his waivers were voluntary, knowing, and  
5 intelligent.

6 In his new Affidavit, Defendant additionally states he does not  
7 remember having the form in his hands while it was being read to him and  
8 many others held in the cell with him. Defendant also states that the  
9 immigration officer told him that if he signed the form, he could be  
10 immediately deported. Ct. Rec. 40-1. Defendant states that the entire  
11 process lasted less than forty-five minutes. Defendant states he did not  
12 speak to an attorney, and nobody explained his rights during the process,  
13 i.e., right to voluntary departure, right to appeal, right to counsel.  
14 Defendant concludes if he had understood the rights that he was giving  
15 up by signing the form, and eligibility for voluntary departure at a  
16 removal hearing, he would not have given up his right to appear before  
17 an IJ. Defendant states he was prejudiced by the due process violation  
18 because he was in fact eligible for voluntary departure.

20 **C. Analysis**

21 Under 8 U.S.C. § 1326(a), an alien is criminally liable if he is  
22 found in the United States after he "has been denied admission, excluded,  
23 deported, or removed," without consent of the Attorney General or other  
24 advance consent. "In a criminal prosecution under § 1326, the Due Process  
25 Clause of the Fifth Amendment requires a meaningful opportunity for

1 judicial review of the underlying deportation." *United States v. Zara*  
2 *te-Martinez*, 133 F.3d 1194, 1197 (9th Cir.1998), overruled on other  
3 grounds by *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir.2002)  
4 (en banc). If the district court finds that "(1) [the defendant's] due  
5 process rights were violated by defects in his underlying deportation  
6 proceeding, and (2) he suffered prejudice as a result of the defects,"  
7 the deportation stemming from the defective proceedings may not be used  
8 to prove the defendant violated § 1326. *United States v. Ramos*, 623 F.3d  
9 672, 680 (9th Cir.2010) (quoting *United States v. Palares-Galan*, 359 F.3d  
10 1088, 1095 (9th Cir.2004)); see generally *United States v. Mendoza-Lopez*,  
11 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987).

12 Defendant Gomez moves the Court to dismiss the § 1326 charge against  
13 him because the deportation relied upon in the Indictment violated his  
14 due process rights. Mr. Gomez argues first, that he was denied due  
15 process during the 2006 deportation proceedings because the IJ did not  
16 make a pre-removal finding that he voluntarily, knowingly, and  
17 intelligently waived his right to a hearing, right to counsel, and right  
18 to appeal; and second, that he was prejudiced by this due-process denial  
19 because it prevented him from seeking voluntary departure.  
20

21 The Government disputes that the underlying deportation proceedings  
22 were defective and argues that Mr. Gomez has not demonstrated prejudice.  
23 Defendant, on the other hand, argues, citing *Rivera-Cuartas v. Holder*,  
24 605 F.3d 699 (9th Cir.2010), that he could have requested voluntary  
25 departure because Mr. Gomez's Arizona conviction for Second Degree  
26

1 Attempted Sexual Conduct with a Minor Under the Age of 15 in violation  
2 of ARS 13-1405 does not meet the generic definition of sexual abuse of  
3 a minor such that it amounts to an aggravated felony.

4 The question raised by the defendant's Motion to Dismiss is whether  
5 *Ramos, supra*, requires the IJ to have an oral colloquy with the defendant  
6 before the judge can conclude that the defendant's waiver of counsel is  
7 "knowing and voluntary." Defendant states in support of his motion for  
8 reconsideration that no one, including the IJ, inquired about his desire  
9 to have counsel, in direct contradiction to paragraphs 3 and 4 of the  
10 "Stipulated Request For Removal Order and Waiver of Hearing," where Mr.  
11 Gomez certifies that all the information he has given in the stipulated  
12 request is true and correct, including the following information given  
13 in Spanish and English:

15 3. I have also received a Legal Aid Services list.

16 *Tambien he recibido una lista de Servicios de Asistencia Legal.*

17 4. I have been advised of my right to be represented by an  
18 attorney of my choice, at my own expense, during these proceedings.  
19 I waive this right. I will represent myself in these proceedings.  
20 *Se me ha informado sobre mi derecho de ser representado por un  
abogado de mi elección a costa propio, durante estos  
procedimientos. Yo renuncio voluntariamente este derecho. Yo me  
representare a mi mismo en estos procedimientos.*

21 Ct. Rec. 29-1, Exh. C.

22 The Ninth Circuit explained in *Ramos*:

23 "Although there is no Sixth Amendment right to  
24 counsel in an immigration hearing, Congress has  
25 recognized it among the rights stemming from the  
Fifth Amendment guarantee of due process that adhere  
to individuals that are the subject of removal  
proceedings." *Tawadrus v. Ashcroft*, 364 F.3d 1099,

1 1103 (9th Cir.2004). " 'Although IJs may not be  
2 required to undertake Herculean efforts to afford  
3 the right to counsel, at a minimum they must [(1)]  
4 inquire whether the petitioner wishes counsel, [(2)]  
5 determine a reasonable period for obtaining counsel,  
6 and [(3)] assess whether any waiver of counsel is  
knowing and voluntary.' " *Ram v. Mukasey*, 529 F.3d  
1238, 1241-42 (9th Cir.2008) (alterations in  
original) (*quoting Biwot v. Gonzales*, 403 F.3d 1094,  
1100 (9th Cir.2005)).

7 *Ramos*, 623 F.3d at 682.

8 Of significance, the Court in *Ramos* did not invalidate 8 C.F.R. §  
9 1003.25 which permits removal without the necessity of the parties  
10 appearing before the immigration judge. The question raised by  
11 defendant's Motion to Dismiss is whether *Ramos* requires the IJ to have  
12 an oral colloquy with the defendant in all cases before the immigration  
13 judge can conclude that his waiver of counsel is knowing and voluntary.  
14

15 As noted previously, the facts in *Ramos* involved independent  
16 evidence of a problem with the Spanish translation that was utilized as  
17 part of the deportation proceeding. In the current case, the defendant's  
18 affidavits directly attack a waiver document written in his native  
19 language which he had the opportunity to read and, insofar as known, did  
20 not question before signing in 2006 after the contents were explained to  
21 him in his native language. Given his level of education as appears in  
22 the record and the fact that the requirements of 8 C.F.R. § 1003.25 were  
23 not invalidated by the 9<sup>th</sup> Circuit, the defendant's Motion to Reconsider  
24 is respectfully DENIED.

25 **IT IS HEREBY ORDERED:**

26 1. Defendant's Motion to Reconsider, Ct. Rec. 39, is DENIED.

2. Defendant's Motion to Dismiss, Ct. Rec. 28, is DENIED.

**IT IS SO ORDERED.** The District Court Executive is directed to enter this order and to provide copies to all counsel, the U.S. Probation Office, the U.S. Marshal, and the Jury Administrator.

**DATED** this 2nd day of May, 2011.

*s/Lonny R. Suko*

LONNY R. SUKO  
UNITED STATES DISTRICT JUDGE